Federal Labor Relations Authority
Quarterly Digest Report: October 1, 2022 – December 31, 2022

The following case digests are summaries of decisions/orders issued by the Federal Labor Relations Authority, with a short description of the issues and facts of each case. Descriptions contained in these case digests are for informational purposes only, do not constitute legal precedent, and are not intended to be a substitute for the opinion of the Authority.

CASE DIGEST: *AFGE, Loc. 1858,* 73 FLRA 296 (2022)

The Authority's Office of Case Intake and Publication (CIP) issued an order directing the Union to provide documentary evidence related to the Union's exceptions. After the deadline to respond to the order expired, the Union filed an extension-of-time request. Subsequently, CIP issued an order directing the Union to show cause why the Authority should not dismiss its exceptions for failure to comply with the earlier order. Because the Union did not establish extraordinary circumstances justifying waiving the expired time limit, the Authority dismissed the Union's exceptions.

CASE DIGEST: *U.S. DHS, ICE*, 73 FLRA 299 (2022) (Member Grundmann concurring; Member Kiko dissenting)

After a Union filed a disclaimer-of-interest petition, a local representative from the unit at issue filed a request to intervene. The Regional Director (RD) issued a decision and order denying the intervention request. The RD found that the individual lacked standing to intervene because he did not qualify as a labor organization, agency, or activity under § 2421.11(b)(2) of the Authority's Regulations. In an application for review, the individual argued that the RD misinterpreted § 2421.11. Because the application for review did not establish that the RD failed to apply established law, the Authority denied it.

Member Grundmann concurred, noting that she was concerned about the implications of not allowing the individual to intervene, but emphasizing that the narrow arguments presented in the application for review did not provide a basis for reversing the RD.

Member Kiko dissented on the basis that the RD's decision, and the process by which it was reached, suppressed affected-employee input in a manner that was fundamentally incompatible with employees' statutory rights.

CASE DIGEST: *AFGE, Nat'l ICE Council 118 & U.S. DHS, U.S. ICE, Enforcement & Removal Operations*, 73 FLRA 309 (2022) (Chairman DuBester dissenting)

The case involves a dispute over whether the Agency was allowed to implement a training policy without bargaining with the Union. The Arbitrator found that implementation of the policy was covered by an article of the parties' agreement concerning training, and therefore, the Agency did not have a duty to bargain. The Union filed exceptions to the award, arguing that the award was contrary to the Federal Service Labor-Management Relations Statute (Statute) and failed to draw its essence from the parties' agreement. The Authority found that the award was consistent with the Statute and Authority precedent regarding the covered by doctrine. The Authority also found that the award drew its essence from the parties' agreement because the Union failed to demonstrate how the Arbitrator's interpretation was implausible. Accordingly, the Authority denied the Union's exceptions and upheld the award.

Chairman DuBester dissented. In his view, the subject matter of the change at issue was not covered by the parties' agreement, and the Union did not waive its right to bargain over the change pursuant to the language in the agreement. Based on this conclusion, he would also find that the Arbitrator should have addressed whether the agreement separately provided for mid-term bargaining regarding the change.

CASE DIGEST: *U.S. Dep't of HHS & NTEU*, 73 FLRA 315 (2022) (Chairman DuBester concurring)

The case involved a dispute over whether the Agency was allowed to implement a Federal Services Impasse Panel Decision and Order (Order) *prior* to completing bargaining on a successor collective-bargaining agreement (CBA). In the merits award, the Arbitrator found the Agency violated 5 U.S.C. § 7116(a)(1) and the parties' 2010 CBA by implementing the Order prior to completing bargaining on the successor CBA. In a separate remedial award, the Arbitrator granted in part, and denied in part the Union's requested remedies. Both the Union and the Agency filed exceptions to the merits and remedial awards. The Authority found the merits award was contrary to the Federal Service Labor-Management Relations Statute because the Arbitrator incorrectly found the Agency's actions did not violate 5 U.S.C. § 7116(a)(5). The Authority also granted the Union's request to remand the matter of attorney fees because the Arbitrator disregarded Authority precedent on the time period for filing a request for attorney fees. The Authority denied in part, and dismissed in part, the remainder of the Union's and Agency's exceptions.

Chairman DuBester concurred, stating that he would find the Agency's repudiation of the 2010 CBA was a violation of 5 U.S.C. § 7116(a)(5).

CASE DIGEST: *AFGE, Loc. 3254*, 73 FLRA 325 (2022)

The Arbitrator found that the Union violated § 7114(b)(5) of the Federal Service Labor-Management Relations Statute by refusing to execute a collective-bargaining agreement after the parties had reached agreement. The Union filed an exception challenging the award as contrary to an executive order. Because the cited executive order was not in effect at the time the parties had reached agreement, the Authority found it could not excuse the Union's statutory violation. Accordingly, the Authority denied the exception because the Union failed to demonstrate the award was contrary to law.

CASE DIGEST: *NAIL, Loc. 11*, 73 FLRA 328 (2022)

The Arbitrator found that the Agency did not violate the parties' collective-bargaining agreement by awarding different pay increases to bargaining and non-bargaining unit employees. The Union filed exceptions to the award on essence and nonfact grounds. The Authority found that the Union failed to establish that the award was deficient on either ground and denied the exceptions.

CASE DIGEST: *AFGE, Council 169*, 73 FLRA 331 (2022)

In this case, the Union filed a grievance alleging that the Agency was required to bargain over executive orders (EOs) 13,836, 13,837, and 13,839 prior to implementing them. The Arbitrator issued an award directing the Agency to bargain over procedures and appropriate arrangements with respect to EOs 13,837 and 13,839. The Agency filed exceptions. While those exceptions were pending before the Authority, President Biden issued EO 14,003, which revoked the above-referenced three EOs. As a result, the Authority found that the parties' underlying dispute was moot, and vacated the award.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Butner, N.C.*, 73 FLRA 334 (2022) (Member Grundmann concurring)

The Arbitrator issued an award finding the Union failed to comply with the parties' agreement because the Union filed its grievance with the wrong Agency official. The Union filed essence and exceeded-authority exceptions to the award. The Authority found that the Union failed to establish the award was deficient on those grounds, and denied the exceptions.

Member Grundmann concurred, noting that she would deny the Union's request for an expedited, abbreviated decision because an unfair-labor-practice issue was raised to the Arbitrator, rather than for the reasons stated by the majority.

CASE DIGEST: *AFGE, Loc. 1738 and U.S. Dep't of VA Med. Ctr., Fayetteville, N.C.,* 73 FLRA 339 (2022)

In response to the COVID-19 pandemic, the Agency altered bargaining-unit employees' duty schedules. The Union grieved the change, claiming that it violated the parties' collective-bargaining agreement. Finding that § 7106 of the Federal Service Labor-Management

Relations Statute authorized the Agency to change duty schedules during an emergency, the Arbitrator determined that the Agency did not violate the parties' agreement. The Authority denied the Union's essence and nonfact exceptions for failing to demonstrate that the award was deficient.

CASE DIGEST: *U.S. HUD*, 73 FLRA 342 (2022) (Member Kiko dissenting)

The Arbitrator sustained the Agency's official reprimand of the grievant but directed the Agency to change the grievant's five-day suspension to five days of absence without leave. The Authority found that the Arbitrator implicitly found the Agency violated the parties' agreement by imposing the five-day suspension, and thus did not exceed his authority by awarding a remedy regarding the suspension. The Authority also denied the Agency's other exceeded-authority and essence exceptions to the award.

Because the Arbitrator issued a remedy without finding a violation of law or contract, Member Kiko would have granted the Agency's exceeded-authority exception and set aside the remedial portion of the award.

CASE DIGEST: *NTEU, Chapter 298*, 73 FLRA 350 (2022)

The Arbitrator found that the Agency violated the parties' collective-bargaining agreement and Title VII of the Civil Rights Act of 1964 by not granting the grievant a hardship transfer and awarded the grievant limited backpay on the basis that the grievant had failed to mitigate the damages. The Union filed exceptions to the remedial award on nonfact and contrary-to-law grounds. The Authority found the Union failed to demonstrate that the award was deficient on either ground, and denied the exceptions.

CASE DIGEST: *U.S. DHS, U.S. Citizenship & Immigr. Servs. & AFGE, Loc. 4014, Nat'l Citizenship & Immigr. Servs., Council 119*, 73 FLRA 354 (2022)

In this case, the Agency argued the Arbitrator lacked authority to issue an attorney fee award (fee award) after both the time limit set by the parties' agreement and the parties' mutually-agreed-upon extensions of time expired. Because the Arbitrator failed to address potentially dispositive contractual language, the Authority remanded the fee award to the parties for resubmission to the Arbitrator, absent settlement, for further findings on whether the fee award was timely.

CASE DIGEST: *U.S. Dep't of the Army, Army Materiel Command, Army Sec. Assistance Command, Redstone Arsenal, Ala.*, 73 FLRA 356 (2022) (Member Kiko dissenting)

The Agency filed interlocutory essence exceptions to the Arbitrator's interim award finding the grievance procedurally arbitrable. The Authority revisited the standard regarding review of interlocutory exceptions to arbitration awards, clarifying that such review is warranted only when the excepting party demonstrates *both* that the arbitrator lacks jurisdiction as a matter of law *and* that resolving the exceptions would bring an end to the entire dispute that the parties

submitted to arbitration. Applying the revised standard, the Authority dismissed the Agency's exceptions without prejudice.

Member Kiko dissented to both the change in the standard for reviewing interlocutory exceptions and the majority's dismissal of the exceptions. In her view, the previous interlocutory-review standard more closely adhered to the directives of the Federal Service Labor-Management Relations Statute, improved government efficiency, and demonstrated greater respect for parties' collective-bargaining agreements.

CASE DIGEST: *AFGE, Loc. 2076, Nat'l Citizenship & Immigr. Serv. Council*, 73 FLRA 368 (2022).

The Arbitrator issued an award finding that, under the parties' agreement, the Union should have filed its grievance as a national grievance with the Agency's national labor and employment relations (LER) office. Because the Union filed the grievance with a regional LER office, the Arbitrator dismissed the grievance as procedurally inarbitrable. The Union filed exceptions on nonfact and essence grounds. The Authority denied the exceptions because the Union failed to demonstrate the award was deficient on either ground.

CASE DIGEST: *SSA*, 73 FLRA 370 (2022) (Member Kiko dissenting)

The Arbitrator found that the Agency could lawfully reimburse bargaining-unit employees for their eye exams and prescription glasses or contacts if the employees' doctors certified that the glasses or contacts were needed to avoid eyestrain or other optical-related problems when using electronic screens. The Authority remanded the dispute to the parties for resubmission to the Arbitrator, absent settlement, for further findings necessary to determine whether 5 U.S.C. § 7903 or 29 U.S.C. § 668 authorized the reimbursements.

Member Kiko dissented, stating that a remand under these circumstances was futile because there were no arbitral findings that could establish that the parties' reimbursement program was lawful.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 73 FLRA 376 (2022)

The Arbitrator issued an award resolving disputes over remedial issues related to a previous award he had issued. The Agency filed exceptions alleging the Arbitrator exceeded his authority, and the award was contrary to law, based on the doctrine of functus officio. The Authority found that, in his previous award, the Arbitrator had retained jurisdiction to resolve the remedial issues and that he was merely acting in accordance with that retained jurisdiction. Accordingly, the Authority denied the Agency's exceptions.

CASE DIGEST: *U.S. Marine Corps, Marine Corps Air Ground Combat Ctr., Twentynine Palms*, 73 FLRA 379 (2022) (Member Kiko dissenting in part)

In this case, the Arbitrator determined that the grievance concerned a temporary promotion and that it did not involve classification under § 7121(c)(5) of the Federal Service

Labor-Management Relations Statute (the Statute). On review, the Authority found that the Arbitrator properly found that the grievance did not involve classification. Importantly, the Authority noted that it will no longer follow *U.S. Small Business Administration*, 70 FLRA 729 (2018) (*SBA I*) (then-Member DuBester dissenting) and Authority decisions following it, because those decisions do not provide an adequate justification for switching the Authority's classification standards. Rather, the Authority will return to the classification standard applied by the Authority prior to *SBA I*. Additionally, the Authority held that the award is contrary to § 7122(b) of the Statute insofar as it requires the Agency to take any action before the award becomes final and binding. Accordingly, the Authority denied the Agency's exceptions in part, granted them in part, and modified the award in accordance with the decision.

Member Kiko would have upheld the Arbitrator's finding that the grievance did not concern classification under the standard articulated in *SBA I*. Because the majority applied a deficient pre-*SBA I* standard to resolve the Agency's classification exception, and failed to provide a basis for departing from *SBA I* and subsequent decisions that follow that precedent, she dissented in part.

CASE DIGEST: *Pension Benefit Guaranty Corp., Wash., D.C.*, 73 FLRA 386 (2022)

An administrative law judge recommended dismissing an unfair-labor-practice complaint alleging that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute by repudiating a memorandum of understanding with the Charging Party about deducting dues from bargaining-unit employees' pay. The Authority denied the General Counsel's exception, adopted the recommended decision, and dismissed the complaint.

CASE DIGEST: *U.S. DOD Educ. Activity, Alexandria, Va.*, 73 FLRA 398 (2022) (Member Kiko dissenting)

In this case, the Authority considered the Union's motion for reconsideration of the Authority's decision in *U.S. DOD Education Activity, Alexandria, Va. (DODEA)*, 71 FLRA 765 (2020) (then-Member DuBester dissenting). In *DODEA*, the Authority had concluded that the Arbitrator's procedural-arbitrability determination did not represent a plausible interpretation of the parties' agreement, granted the Agency's essence exception, and vacated the award. However, the Authority granted the Union's motion for reconsideration because of the U.S. Court of Appeals for the District of Columbia Circuit's intervening decision in *National Weather Service Employees Organization v. FLRA (NWSEO)*, 966 F.3d 875 (D.C. Cir. 2020). The Authority concluded that under the standard as articulated by the court in *NWSEO*, the Arbitrator's procedural-arbitrability determination drew its essence from the parties' agreement. The Authority considered the merits of the Agency's additional exceptions that were not considered in *DODEA*. The Authority dismissed or denied the Agency's remaining exceptions.

Member Kiko dissented. She found that the Union's motion for reconsideration did not establish extraordinary circumstances to warrant reconsideration of *DODEA*, and she disagreed with the majority that *NWSEO* controlled the outcome in this case. Further, she criticized the

majority's analysis as being inconsistent with Authority precedent that anticipatory contractual breaches cannot serve as the bases for unfair-labor-practice claims.